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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ROGER LEE CUMMINGS,

Defendant and Appellant.

D039085

(Super. Ct. No. SCS162071)

APPEAL from a judgment of the Superior Court of San Diego County, Raymond Edwards, Jr., Judge. Affirmed.

Roger Lee Cummings pled guilty to one count of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).) The court sentenced Cummings to two years in a state penitentiary. Cummings appeals, contending the court abused its discretion by not granting him probation because (1) his case was unusual under California Rules of Court, rule 4.413 and (2) prior to accepting his plea, the court did not tell Cummings that probation would be disfavored under Penal Code section 1203. We affirm.

## FACTUAL AND PROCEDURAL HISTORY

According to the evidence presented at the preliminary hearing,<sup>1</sup> on August 26, 2001, Cummings punched Kimberly Gomez in the mouth, knocking out the temporary caps on her two front teeth. Two young men told Chula Vista police officer Thomas Halfaker they saw Cummings backhand Gomez with a closed fist. The men approached Gomez, who was in a parking lot, to offer their help. Cummings then drove a pickup truck directly at the threesome, forcing them to move to avoid being hit. After Cummings parked the truck, he told the young men he was going to shoot them.

Gomez told Halfaker that she had been walking with Cummings, who turned suddenly and punched her in the mouth with a closed fist, knocking her teeth out. She also told Halfaker that she and the two men had to move to avoid being hit by Cummings's truck. Gomez did not appear to be under the influence of alcohol.

Gomez testified the only thing she remembers about the incident is speaking to the police officer and showing the officer Cummings's truck because she was quite intoxicated on beer and wine. Because her temporary caps came out quite easily, she often glued them in with super glue.

The court held Cummings to answer on all charges. Cummings then pled guilty to one count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) in exchange

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<sup>1</sup> The parties stipulated that the preliminary hearing transcript is the basis for the plea.

for the dismissal of two other counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and one count of corporal injury to a roommate (Pen. Code, § 273.5, subd. (a)). The plea agreement notified Cummings that he could be sentenced to up to four years in state prison. At the plea hearing, Cummings told the court that nothing else had been promised to him.

At the sentencing hearing, the court explained why it did not grant probation: "I'll tell you the problem I have in granting your client probation. Aside from the extensive record he has, which includes a prison record and significant record, he still maintains that the victim slapped herself and hit herself, knocked out her own front teeth. . . . In any event, defendant is presumptively ineligible for probation unless the court finds unusual circumstances. The court does not."

## DISCUSSION

### I. *Probation under California Rule of Court, rule 4.413*

Cummings contends the court abused its discretion by not granting probation even though he is presumptively ineligible under Penal Code section 1203, subdivision (e)(4) because his case is an unusual one under California Rule of Court, rule 4.413. We review a court's decision whether to grant probation as well as a court's finding that a case may be unusual under the abuse of discretion standard. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831 (*Du*).) Under that standard, "[o]ur function is to determine whether the . . . court's order is arbitrary or capricious, or ' " 'exceeds the bounds of reason, all of the circumstances being considered.' " ' [Citation.] The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or

arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.

[Citations.]" (*Ibid.*) In reviewing the court's action, we recognize that probation is "an act of leniency, not a matter of right." (*People v. Birmingham* (1990) 217 Cal.App.3d 180, 185.)

Cummings is presumptively ineligible for probation under Penal Code section 1203, subdivision (e)(4),<sup>2</sup> which provides: "Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons: . . . [¶] (4) Any person who has been previously convicted twice in this state of a felony or in any other place of a public offense which, if committed in this state, would have been punishable as a felony." The probation report shows that Cummings had been convicted of four felonies: a 1979 conviction of robbery (Pen. Code, § 211), two 1986 convictions for unlawful driving or taking of a vehicle (Veh. Code, § 10851), and a 1988 conviction for receiving stolen property (Pen. Code, § 496). Between 1978 and 1989, Cummings was also convicted of multiple misdemeanors.

To determine whether a case is unusual for the purposes of Penal Code section 1203, the court must apply California Rule of Court, rule 4.413. Cummings contends the

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<sup>2</sup> Because Cummings is presumptively ineligible under Penal Code section 1203, subdivision (e)(4), we do not consider his contention that the court erred in finding him presumptively ineligible under Penal Code section 1203, subdivision (e)(2).

court abused its discretion by not considering his case unusual because it had been 13 years since his last felony conviction and he had been a productive, drug-free citizen since then.

California Rule of Court, rule 4.413, subdivision (c)(1)(ii) provides in part: "The following facts *may* indicate the existence of an unusual case in which probation may be granted if otherwise appropriate: [¶] (1) . . . A fact or circumstance indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case, including: . . . [¶] (ii) The current offense is less serious than a prior felony conviction that is the cause of the limitation on probation, and the defendant has been free from incarceration and serious violation of the law for a substantial time before the current offense." (Italics added.) Although Cummings's last felony conviction was 13 years ago, his record show four, not two, prior felony convictions. The court was also concerned by Cummings's failure to take responsibility for punching Garcia in the mouth; Cummings told the probation officer that Garcia hit herself even though two disinterested witnesses saw him punch her. Moreover, California Rule of Court, rule 4.413, subdivision (c) does not require the court find a case unusual if the facts it specifies are met; it states the court *may* find the case unusual. The court did not abuse its discretion when it did not find Cummings's case unusual based upon Cummings's significant criminal record and his failure to take responsibility for his actions.

Cummings also contends the case is unusual because his actions were provoked by Gomez's behavior. California Rule of Court, rule 4.413, subdivision (c)(2)(1) provides in part: "A fact or circumstance not amounting to a defense, but reducing the defendant's

culpability for the offense, including: (i) The defendant participated in the crime under circumstances of *great provocation*, coercion, or duress not amounting to a defense, and the defendant has no recent record of committing crimes of violence." (Italics added.) Cummings points to the underlying argument with Garcia, who may have been intoxicated at the time, as the provocation. We disagree, because an argument — even one with an intoxicated person — cannot be considered great provocation.

## II. *Failure to Inform Cummings that Probation was Disfavored*

We reject Cummings's contention that the court's failure to notify him that probation was disfavored violated his due process rights. As the California Supreme Court has explained: "Unlike the admonition of constitutional rights, however, advisement as to the consequences of a plea is not constitutionally mandated." (*People v. Walker* (1991) 54 Cal.3d 1013, 1022.)

We also reject Cummings's contention that the court must notify a defendant that probation is disfavored because the disfavored status is a direct consequence of the plea. Cummings relies upon *People v. Caban* (1983) 148 Cal.App.3d 706, 712, which held that the statutory *prohibition* of probation is a direct consequence of the plea. However, there is a significant difference between a statute that prohibits probation and Penal code section 1203, which "does not remove any of the trial judge's options in sentencing a defendant with two prior felony convictions. Such a defendant can be granted probation in the trial court's discretion, subject to the limitation that the case be an unusual one, 'where the interest of justice would best be served if the person is granted probation . . . .' [Citations.]" (*People v. Dorsch* (1992) 3 Cal.App.4th 1346, 1350.)

A trial court is not required to advise the defendant that probation is statutorily disfavored unless the record shows a "climate of 'real anticipation' " that probation is likely. (*People v. Vento* (1989) 208 Cal.App.3d 876, 879-880.) Cummings has not shown a climate of real anticipation that probation was likely in his case. First, the record does not show that Cummings was promised probation or that probation was likely. On the contrary, the plea agreement notified Cummings that he could be sentenced to up to four years in state prison. The only mention of probation during the plea hearing was the court's statement: "If you're sent to state prison either initially, that is, at the beginning, or after a revocation of probation . . . ." This statement "simply indicated [the court] was ruling out none of its sentencing options." (*People v. Vento, supra*, at p. 879.) Second, Cummings did not attempt to withdraw his plea prior to sentencing even though the probation report stated he was presumptively ineligible for probation. Finally, Cummings expressed no surprise when sentenced to prison.

#### DISPOSITION

The judgment is affirmed.

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O'ROURKE, J.

WE CONCUR:

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McDONALD, Acting P. J.

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McINTYRE, J.